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# IN THE SUPREME COURT OF THE UNITED STATES

TERM, 1960

No. 783

SURFCOMBER HOTEL CORP.,
a Florida corporation,

Petitioner,

vs.

DeSOTO HOTEL CORP.,
a Florida corporation,

Respondent.

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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The Petitioner, Surfcomber Hotel Corp., a Florida corporation, by and through its undersigned attorney, brings this Petition for Certiorari and shows unto the Court the following:

This Petition is from a decision of the Supreme Court of Florida, dated December 17, 1959, denying the Petitioner's Petition for Certiorari, and a decision of the Florida District Court of Appeals, 3rd District, dated August 24, 1959.

The Petition for Rehearing the same was denied by the Supreme Court of the State of Florida on January 18, 1960.

## JURISDICTION

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C.A., Section 1257(3).

## QUESTIONS INVOLVED

The questions presented for review are as follows:

A. Where the Constitution of a state provides that the Supreme Court may review by certiorari any decision of a District Court of Appeal that is in direct conflict with a decision of another District Court of Appeal or of the Supreme Court of the State on the same point of law, is it a violation of the Due Process Clause for a District Court of Appeal to deny to a litigant the right to petition the Supreme Court for review by certiorari by the rendering of a per curiam opinion consisting of the one word "affirmed," rather than by rendering a written opinion?

B. Is it proper for a trial court of a state to so distort the plain and simple provisions of a contract, that the construction placed upon the words used results in the court, to all intents and purposes, making a new contract between the parties?

C. Is it proper, for an appellate court to affirm a lower court's decision, based upon a distortion of the facts alleged, by a per curiam opinion, presumably based by the appellate court, upon a technicality of pleading which is amendable, under the rules of pleading of the state, and

by such action permit the lower court to deprive the Plaintiff of his property without due process of the law and deny him the equal protection of the law, when such ruling of the lower court results in the Court making a new contract between the parties?

D. Where a Complaint, filed in the trial court is, if defective, amendable so as to state a cause of action, and the trial court dismisses such Complaint with prejudice for failure to state a cause of action, and where the appellate court refuses to follow those decisions of the State of Florida that hold that where a Complaint, is defective, the complaining party should be permitted to amend such Complaint, has the Petitioner been denied due process of law and the equal protection of the laws?

## CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the construction of Article V, Section 4, Subsection 2, of the Constitution of the State of Florida, the pertinent portion of which reads as follows:

> "The Supreme Court may review by certiorari any decision of a District Court of Appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the District Court of Appeal to be of great public interest, or that is in direct conflict with the decision of another district court of appeal or of the Supreme Court, on the same point of law, and may issue writs of certiorari to commissions established by law."

And also a portion of the Fourteenth Amendment of the United States Constitution:

"AMENDMENT XIV. Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## FACTS

Briefly, the facts in this case are as follows:

The Petitioner was the Plaintiff in the trial court in a contract action, in the Circuit Court in and for Dade County, Florida. The Second Amended Complaint filed in the cause alleged that an agreement was entered into between the Plaintiff and Defendant, whereby the Defendant leased or rented a concession or license for the guests of the Defendant to use a swimming pool located on the Plaintiff's property. The Plaintiff further alleged that the Defendant covenanted and agreed to purchase and provide public liability insurance insuring the Plaintiff against any liability for injury or damage sustained by any guest of the Defendant while on the premises covered by the agreement and that, in addition, the Defendant agreed to make the Plaintiff a co-insured with the Defendant under the policy of public liability insurance to be obtained, which agreement the Defendant breached by failing to obtain such insurance coverage. The Plaintiff further alleged that a guest of the Defendant was injured in an accident in and about the swimming pool on the Plaintiff's premises and that said guest recovered damages against the Plaintiff in a suit at law. The Complaint further alleges that the Defendant was notified of the law suit and requested to undertake the defense of the law suit by reason of the

Defendant's undertaking to provide public liability insurance, which the Defendant failed and refused to do. In addition, it is alleged that the Defendant, who was required to undertake the defense of the Plaintiff through the Defendant's insurance carrier, failed to undertake the appeal from the trial court judgment and subsequently failed to pay the judgment which the Plaintiff was compelled to pay. It is alleged that Plaintiff paid the judgment, interest and costs and expended money in defending the original suit. As a result of the foregoing, the Plaintiff asked for damages in excess of Five Thousand ($5,000.00) Dollars.

Paragraph 14 of the lease agreement between the Plaintiff and the Defendant was annexed to the Complaint as Plaintiff's Exhibit A. Paragraph 14 reads as follows:

> "14. DeSOTO HOTEL CORP. will be required to furnish as its own expenses, a public liability insurance policy insuring the parties of the first and second part, or so many of them as from time to time retain an interest in the property to which this license pertains, against liability for injury or damages sustained by any guest of DeSOTO HOTEL CORP. while on the premises covered by this license and said policy shall be in the amount of $100,000.00 for injury to one person and $200,000.00 for injury to more than one person and shall name those of the parties of the first and second part as are interested in said property from time to time as co-insureds with DeSOTO HOTEL CORP. thereunder."

It is to be noted that the Surfcomber Hotel Corp. and

others were the parties of the first and second part, while the DeSoto Hotel Corp. was the party of the third part, as alleged in paragraph 4 of the Second Amended Complaint.

The Defendant filed a Motion to Dismiss the Second Amended Complaint on the grounds that the Complaint failed to state a cause of action against the Defendant upon which relief could be granted.

At the hearings on the Defendant's Motion to Dismiss the Plaintiff's Amended Complaint for failure to state a cause of action, the Defendant argued that Paragraph 14 was simply an indemnification agreement and not an agreement to provide public liability insurance for the protection of the Plaintiff. The Defendant further argued that Paragraph 14 was an indemnification agreement which indemnified only against the negligence of the Defendant and not that of the Plaintiff. The trial court accepted this argument of the Defendant and dismissed the Plaintiff's Complaint with prejudice, holding orally that Paragraph 14 was an indemnification agreement and not a contract to purchase public liability insurance for the Plaintiff's protection and that said indemnification agreement indemnified only against the Defendant's negligence. The trial court, thereupon, entered an Order dismissing the Second Amended Complaint with prejudice and, subsequently, entered a Final Judg- with prejudice and, subsequently, entered a final judgment, from which final judgment an appeal to the District Court of Appeal was taken.

On the foregoing facts, the District Court of Appeal was presented with the following questions of Law:

WHERE A CORPORATION OPERATES A HOTEL AND SWIMMING POOL AND GRANTS ANOTHER CORPORATION A CONCESSION TO USE THE POOL, AND IN THE AGREEMENT GRANTING THE CONCESSION, THE CONCESSIONAIRE AGREES TO PROVIDE THE OWNER AND OPERATOR OF THE HOTEL WITH PUBLIC LIABILITY INSURANCE COVERING THE GRANTING HOTEL AND ALL POSSIBLE SUBSEQUENT OWNERS OR OPERATORS THEREOF AGAINST LIABILITY AS THE RESULT OF INJURY TO A GUEST OF THE CONCESSIONAIRE USING THE POOL UNDER THE CONCESSION, AND THE CONCESSIONAIRE FAILS TO PROCURE SUCH INSURANCE, AND A CLAIM ENSUES AND IS PROSECUTED TO A FINAL CONCLUSION WITH THE CONCESSION GRANTING HOTEL PAYING AND SATISFYING THE JUDGMENT, DOES THE GRANTING HOTEL HAVE A CAUSE OF ACTION AGAINST THE CONCESSIONAIRE FOR THE DAMAGES SUSTAINED TO THE GRANTING HOTEL BY REASON OF THE CONCESSIONAIRE'S FAILURE TO PROCURE INSURANCE COVERAGE FOR SUCH LIABILITY. The trial court answered this question in the negative."

The Respondent, for the first time, on appeal, raised the question that the Petitioner never expressly alleged in its Complaint that the Respondent failed to obtain the insurance in question. During the oral argument before the District Court of Appeal, it became apparent that the

District Court of Appeal placed great significance upon this aspect of the case. Such matters became evident from the fact that the Court directed numerous questions to Petitioner's counsel during the course of the hearing, all of which questions were devoted to the issue of the lack of allegations concerning the failure to obtain insurance. The Complaint, however, specifically alleged a general breach of Paragraph 14 of the agreement, said paragraph, above quoted, containing the undertaking of the Defendant to procure the insurance.

Subsequently, the District Court of Appeals rendered a per curiam opinion in this cause consisting of the one word "affirmed," and it is the Petitioner's contention that this decision was rendered upon an issue raised for the first time on appeal, to-wit: that the Petitioner had failed to allege that the Respondent had failed to obtain the insurance in question.

A Petition for Rehearing, addressed to the District Court of Appeals was denied, and a Petition to Certify a Question as one of Great Public Interest was also denied.

A Petition for Writ of Certiorari was then direct to the Supreme Court of the State of Florida, wherein the Petitioner argued that the Appellee in the District Court of Appeals had, for the first time, presented an argument directed to an infirmity in the amended Complaint and that had this supposed infirmity been brought to the attention of the trial court then the Complaint could have been amended so as to state a good cause of action. The Petitioner argued that the action of the District Court in accepting such an argument and refusing to remand the case to the trial court to permit the Appellant therein

to amend the Complaint, was in direct conflict with the decision of the Supreme Court of the State of Florida in **Bryant v. Moss Packing Co., 158 So. 713.**

In addition, it was argued that the District Court of Appeals should have rendered a written opinion in the case since by the mere rendering of a per curiam opinion, consisting of the one word "affirmed," the District Court of Appeal could effectively limit redress to the Supreme Court since by the rulings of the Supreme Court of the State of Florida it is next to impossible to find a case to be in direct conflict with another decision of a District Court of Appeal or the Supreme Court where the opinion appealed from consists of the one word "affirmed." See **Lake v. Lake, 103 So.2d 639.**

Subsequently, thereto, the Supreme Court rendered a per curiam Order denying the Petition for Writ of Certiorari. The Petitioner then filed a Petition for Rehearing requesting that a written opinion by the Supreme Court be rendered setting forth the reasons for its decision since a Petition for Certiorari to the United States Supreme Court would be filed. The Supreme Court of the State of Florida declined to render such a written opinion and did deny the Petition for Rehearing.

The federal questions in this case were raised in the following manner:

Following the rendering of the per curiam opinion, consisting of the one word "affirmed," in the District Court of Appeals, the Petitioner herein filed a Petition for Rehearing requesting that a written opinion be rendered and setting forth further that the action of the

District Court of Appeal in rendering a per curiam opinion consisting of the one word "affirmed," was in violation of Article V, Section 4, Subsection 2, of the Constitution of the State of Florida.

Subsequently, upon Petition for Writ of Certiorari to the Supreme Court of the State of Florida, the Petitioner herein further raised the federal questions that the District Court of Appeals violated the constitutional rights of the Petitioner in rendering the per curiam opinion consisting of the one word "affirmed."

It was further brought to the attention of the Supreme Court of Florida that the action of the District Court of Appeals was in direct conflict with a decision of the Supreme Court of the State of Florida and that the District Court of Appeals was denying due process of law to the Petitioner by its refusal to apply the law of the State of Florida.

The Petitioner further brought the federal question to the attention of the Supreme Court of the State of Florida by filing a Petition for Rehearing to the order of the Supreme Court denying the Petition for Certiorari.

The Florida Appellate Courts ruled on the Petitioner's intentions in each instance by denying same in the following manner:

A. By the denial of the Petitioner's Petition for Rehearing in the District Court of Appeals.

B. By the Supreme Court of the State of Florida's Order denying the Petitioner's Petition for Writ of Certiorari.

C. By the Supreme Court of the State of Florida denying the Petition for Rehearing.

## ARGUMENT

(a) The Petitioner contends that the District Court of Appeals, Third District, State of Florida, did not act in accordance with the implied provisions of Article V, Section 4, Subsection 2, of the Florida Constitution, wherein the jurisdiction of the Supreme Court to review by certiorari, decisions of the District Court of Appeals is set forth. Under this provision, the method of review by certiorari by the Supreme Court is authorized where the decision of the District Court of Appeals is in direct conflict with the decision of another District Court of Appeals or the Supreme Court. The District Court of Appeals, however, by the rendering of a per curiam opinion, consisting of the one word "affirmed," as was done in the instant case, can effectively eliminate the right of review by certiorari pursuant to this ground, since under Florida law, it is almost impossible to establish that a per curiam opinion consisting of the one word "affirmed" is in direct conflict with the decision of another District Court of Appeal or the Supreme Court. This matter was shown effectively in the decision of the Supreme Court of the State of Florida in **Lake v. Lake, 103 So. 2d 639**, wherein a per curiam opinion of the District Court of Appeal consisting of the one word "affirmed," was sought to be reviewed by certiorari before the Supreme Court on the ground that the decision was in direct conflict with the decision of the Supreme Court. The Supreme Court discharged the writ of certiorari, holding that it would not dig into the record to determine if the per curiam opinion was in direct conflict with the decision of another

District Court of Appeal or the Supreme Court. The Court indicated that in the vast majority of instances, it would not go behind a judgment per curiam consisting of the one word "affirmed."

Since the Supreme Court has so indicated that review by certiorari of a decision consisting of the one word "affirmed," is exceedingly difficult, a District Court of Appeals could effectively curtail the right of review by certiorari in the Supreme Court by the mere rendering of a per curiam opinion consisting of the one word "affirmed." By so doing, the provisions of Article V, Section 4, Subsection 2, relating to review by certiorari of a decision in direct conflict with decisions of other district courts of appeal or the Supreme Court can be effectively destroyed. When the Constitutional Amendment creating the District Courts of Appeal was enacted, it was the implied intention that written opinions be given where the litigant has indicated that a Petition for Certiorari would be undertaken, since to permit per curiam opinions consisting of the one word "affirmed" would effectively destroy the right to petition for certiorari to the Supreme Court. We contend that since a Constitutional Amendment specifically prescribes redress to the Supreme Court by way of certiorari where the decision of the District Court of Appeals is in direct conflict with the decision of another District Court of Appeal or the Supreme Court, it necessarily follows that the party seeking a writ of certiorari be given the legal opportunity to show that the decision is in direct conflict with the decision of another District Court of Appeal or the Supreme Court. The mere rendering of a per curiam opinion consisting of the one word "affirmed," denies a petitioner the right to obtain review in the Supreme Court of the State of Florida.

In the instant case, if the District Court of Appeal affirmed the lower court's decision on the basis that there was no specific allegation that the liability insurance was not procured, such an opinion would be directly contrary to previous decisions of the State Supreme Court holding that only the ultimate facts need be alleged and also holding that where a complaint is amendable and can state a cause of action, the party shall have the right to amend. If the decision was based upon the unexpressed ruling of the lower court distorting the allegations of fact and distorting the contract, to the extent that it was misconstrued to be an indemnification agreement to indemnify the Plaintiff only against the negligence of the Defendant, then it would be a violation not only of any number of decisions of the Supreme Court of Florida holding that the courts cannot make a new contract between the parties, but also would be violative of the Federal Constitution as well in that respect. And so it can be seen that by reason of the form and substance of the amendment creating the District Courts of Appeal limiting the jurisdiction of the Supreme Court to review their decisions, it becomes incumbent upon the District Court of Appeal to render a decision so that the "point of law" can be reviewed in connection with any claimed conflict with previous decisions of another District Court of Appeal or the Supreme Court of Florida. It follows, therefore, that either the Constitutional Amendment creating the District Courts of Appeal is invalid and repugnant to the Federal Constitution, as heretofore set out, or the Court's interpretation and actions under it are unconstitutional as depriving a party of due process of law and equal protection of the law by failing to do under such Constitutional Amendment that which ought to be done under its plain and clear intendments. In other words, it can be

stated that while the amendment to the Constitution may not of itself be unconstitutional, and may be within the right of a state to enact, it can be made unconstitutional by interpretation of it or by actions as set forth herein.

The Petitioner wishes to emphasize to this Court that this Petition is not directed against the rendering of per curiam opinions as such by appellate courts. Our contention is simply that, under the Constitutional Amendment in the State of Florida creating the District Courts of Appeal and the new Supreme Court jurisdiction, per curiam opinions of the District Courts of Appeal consisting of the one word "affirmed" are improper, as violative of the Due Process provisions of the 14th Amendment to the United States Constitution, particularly where an intention to petition the Supreme Court of the state for certiorari is filed, by reason of the fact that the jurisdiction of the Supreme Court is based upon what is said in the opinion.

(b) The Agreement in question, contained in Paragraph 14 of the lease agreement, is quite explicit and leaves no room for doubt as to the meaning of the paragraph and the intention of the parties. It is simply an agreement to procure public liability insurance by the Respondent.

Agreements to procure insurance are governed by the same legal principles as are other contracts. The case of **Bank of French Broad v. Bryan (N. C.), 83 S.E. 2d 485**, sets forth the principle as follows:

> "Assuming sufficient interest or other recognized consideration, it is generally held that

> where one agrees to procure the issuance of insurance on the property of another and affording protection against designated risks, and fails to do so, he will be held liable within the amount of the proposed insurance for the loss attributable to his default."

The agreement leaves no room for doubt as to whose negligence the insurance was to cover, since it clearly provides that the Petitioner shall be named as a co-insured with the Respondent.

The trial court's action in holding that the agreement was an indemnification agreement which indemnified only against the negligence of the indemnitor was, in effect, to make a new contract between the parties. The appellate courts of Florida thereafter were compelled, under the law, to reverse this decision of the trial court making a new contract between the parties. However, the appellate courts did fail to reverse and such action of the appellate courts of Florida is violative of the due process clause of the Fourteenth Amendment of the United States Constitution in that such action deprives the Petitioner of his property without due process of law.

(c) The action of the District Court of Appeal in affirming the lower court's action could have conceivably been based only upon two possible grounds. The District Court of Appeal's decision was either based upon an agreement with the trial court's distortion of the facts of the case so as to remake the contract or else was based upon the holding that the Appellant had failed to make a necessary allegation in its Complaint. If such decision was, in fact, based upon the first of these grounds, the action of

the District Court of Appeal was certainly improper, in that the agreement in question was clear and explicit and not subject to any doubt or question. The action of the District Court of Appeal would amount to a judicial approval of the action of the trial court in distorting the simple clear words of the agreement and thereby making a new contract between the parties.

If the action of the District Court of Appeal was not, in fact, based upon the foregoing ground, but rather upon the belief that the Appellant had failed to make a necessary allegation in its Complaint, the action of the District Court of Appeal was also improper. If there was such a defect in the Appellant's Complaint, such defect was first brought to the attention of the courts upon appeal. The Complaint was readily amendable at all times to satisfy the requisite legal requirements.

At the hearing in the District Court of Appeal, the Court, through questions directed at counsel, evidenced a great interest in the supposed lack of a necessary allegation, and we sincerely believe that the questions and comments of the Court indicated that the Court accepted the Appellee's contention that the Appellant had failed to make a necessary allegation. Assuming, for the sake of discussion, that such necessary allegation was lacking, then, of course, the appellate court should have permitted the Appellant to amend his Complaint in the trial court since the objection was first brought to the attention of the court upon appeal.

The viciousness of per curiam opinions in general is that the parties are unable to determine the reasoning upon which the court rendered its affirmance. As ap-

plied to this particular case, the Petitioner is totally unable to determine the grounds upon which the District Court of Appeal rendered its decision. However, it must be seen that the decision of the District Court of Appeal could only have been rendered upon the two possible grounds heretofore set forth, either of which was an improper justification for the affirmance.

(d) The Petitioner further contends that the Second Amended Complaint filed herein does, in fact, state a good cause of action. Under the new rules of Pleading and Practice in Florida, only the ultimate facts on which the pleader relies shall be set forth. See: **Rule 1.8, Florida Rules of Practice and Procedure.** This has been done in the instant case and the Complaint does set forth those ultimate facts upon which the pleader relies. Under Paragraph 19 of the Second Amended Complaint it is alleged that the Defendant has breached and broken its agreement contained in Paragraph 14 of the lease agreement. By this allegation, the ultimate fact upon which the pleader relies has been set forth with exactness.

At the hearing in the District Court of Appeals of the State of Florida, it became apparent through the questions directed by the Court to counsel that the Court felt that the Complaint did not sufficiently allege the breach of the agreement. Although this is disputed, if such were the case, the Complaint was easily amendable. If the Complaint were, in fact, defective because of the lack of certain necessary allegations, such defect was first brought to the attention of the Florida courts upon appeal, it never having been argued to the court at any time prior thereto. Under the law of Florida, if an infirmity in the Complaint is first brought to the attention of the

court upon appeal and, in fact, the Complaint was amendable so as to state a good cause of action, the Appellate Court should permit the Appellant therein to amend his Complaint. See: **Bryant v. Moss Packing Co., (Fla.) 158 So. 713; Kelly v. Board of Public Construction for Baker County, 141 So. 311; Southern Liquor Distributors v. Kaiser, 7 So. 2d 600.**

The reason for these holdings is obvious. It would certainly not be proper for counsel for the Defendant to gain a dismissal of the Complaint for failure to state a cause of action in the trial court, based upon only a small portion of the legal ammunition available to the counsel. If such were the case, it would certainly behoove an attorney filing a Motion to Dismiss the Complaint to save some of his more potent arguments for appeal, rather than by presenting them to the trial court.

The case of **Bryant v. Moss Packing Co., supra**, is interesting to note on this problem. In that case a demurrer was sustained by the trial court which entered an Order general in its terms without setting forth reasons for sustaining the demurrer. The same situation is presented in the instant case. It also appeared, as is also true in the instant case, that the actual infirmity in the Complaint was not brought to the attention of the lower court. The Supreme Court of the State of Florida therein found the Order sustaining the demurrer was proper, since there was a defect in the Complaint, but that the judgment should be reversed, permitting the Plaintiff to amend her Complaint. The Court stated its reasons as follows:

"It is general rule that the appellate court is not

concerned with the reasons or grounds upon which the trial court sustained a demurrer. It is only concerned with the question as to whether or not the demurrer should have been sustained on any ground set forth therein. By applying that rule, the judgment should be affirmed, but a majority of the members of the court are of the opinion, gathered from argument of counsel for the respective parties before us, that the infirmity which we find existing in the declaration was not brought to the attention of the court below specifically and that it is an infirmity which, had it been noticed in the court below, may have been amended."

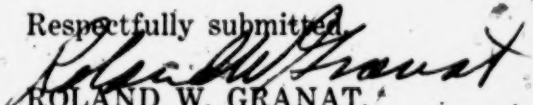
The law is clear in Florida that an appellant, if his complaint is amendable, and if the infirmity in said complaint is first brought to the attention of the court upon appeal, should be permitted to amend his complaint below. This the Florida appellate courts have failed to do in the instant case, despite the directives of the Florida cases on this point.

By so acting, we submit that the Florida appellate courts have denied due process of law to the Petitioner herein in violation of the Fourteenth Amendment of the United States Constitution, and that by so acting, the Florida appellate courts have also denied the equal protection of the laws to the Petitioner herein by in the instant case failing to apply the law as set forth in the previously cited decisions.

## CONCLUSION

It is, therefore, respectfully submitted that his Petition for Writ of Certiorari should be granted.

Respectfully submitted,



ROLAND W. GRANAT,
Attorney for Petitioner.
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Miami Beach 39, Florida.

## CERTIFICATION

The undersigned, ROLAND W. GRANAT, does hereby certify that a copy of said Petition for Certiorari was served by United States mail, by depositing a copy thereof in a United States mail box with first-class postage prepaid, addressed to Williams & Salomon, Esqs., 1003 du-Pont Building, Miami 32, Florida, counsel for the Respondent.

ROLAND W. GRANAT

## APPENDIX

## SECOND AMENDED COMPLAINT

IN THE CIRCUIT COURT OF THE 11th JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA.
AT LAW — NO. 58L-2216-I. (Hon. Robert L. Floyd)

SURFCOMBER HOTEL CORP.,
a Florida corporation,

Plaintiff,

vs.

DE SOTO HOTEL CORP.,
a Florida corporation,

Defendant.

Comes now the Plaintiff, Surfcomber Hotel Corp., a Florida corporation, by its undersigned attorney, and sues the Defendant, DeSoto Hotel Corp., a Florida corporation, and complaining says:

1. The Plaintiff and the Defendant are each Florida corporations organized under the laws of the State of Florida and licensed to do business in the State of Florida.

2. That at the times hereinafter mentioned, the Plaintiff, Surfcomber Hotel Corp., was the owner of certain hotel property known as the Surfcomber Hotel, in Miami Beach, Florida, located at 1717 Collins Avenue, Miami Beach, Florida.

3. That at the times hereinafter mentioned, the DeSoto Hotel Corp. owned and operated the Fairfax Hotel, or Fairfax Hotel and Apartments, located at 1776 Collins Avenue, Miami Beach, Florida.

4. On June 15, 1953, an Agreement was entered into between the Surfcomber Hotel Corp. and others, as parties of the first and second part, and the Defendant DeSoto Hotel Corp. as party of the third part, wherein and whereby the Defendant leased and rented a concession or license for its guests to use a swimming pool located on Surfcomber Hotel property, then and there being operated and owned by the Plaintiff Surfcomber Hotel Corp. or its sublessees, the terms and conditions of which are not material to this suit, except paragraph No. 14, at Page 11, of said Concession Agreement, a true and correct copy of which is attached hereto and made a part hereof, as Plaintiff's Exhibit "A." And Plaintiff avers and alleges that in and by said paragraph No. 14, of the said Concession Agreement, the Defendant expressly covenanted and agreed to purchase and provide public liability insurance, insuring the Plaintiff against any liability for injury or damages sustained by any guests of the Defendant while on the premises covered by the License Agreement and covenanted and agreed to make the Plaintiff as co-insureds with the Defendant under such policy.

And the Plaintiff further avers and alleges that in and by said Agreement, the Defendant impliedly agreed to save the Plaintiff harmless against any liability damage that might be charged against the Plaintiff by reason of the negligence of any person connected with the operation of the swimming pool on the Surfcomber Hotel Corp. property, including the Plaintiff.

5. That the said Agreement, above referred to, was in force and effect on October 1, 1954.

6. That on October 1, 1954, a guest of the Fairfax Hotel or Fairfax Hotel and Apartments, Donna Mower, under the license granted by the Agreement hereinabove alleged, was in and about the pool area of the Surfcomber Hotel and was injured in an accident claimed to have been the result of the negligence of the parties operating the said pool.

7. That on or about December 7, 1954, suit was instituted by Donna Mower, a minor, by her next friend Clarence E. Mower, and Clarence E. Mower, individually, Plaintiffs, v. Surfcomber Hotel Corp., Sea-Surf, Inc., Levleeb Investments, Inc., Seacomber Hotel Corp. and William Danko, individually, in the Circuit Court of the 11th Judicial Circuit of Florida in and for Dade County, Florida, and being designated as Case No. 31952.

8. That during the proceedings in said suit, Levleeb Investments, Inc., Seacomber Hotel Corp. and William Danko were dismissed as Defendants, the suit proceeding against Surfcomber Hotel Corp., Plaintiff herein, and Sea-Surf, Inc., a Florida corporation, then and there operating the hotel under a lease from the Surfcomber Hotel, Inc., the pool being nevertheless under the general control of the Plaintiff, Surfcomber Hotel Corp.

9. That immediately upon the Plaintiff being served with process in said suit, the Defendant herein was notified of the same and requested to undertake the defense of the same by reason of the Defendants undertaking to provide public liability insurance coverage for the Plain-

tiff, pursuant to Paragraph 14 of the Concession Agreement, a copy of which is attached hereto and made a part hereof as Plaintiff's Exhibit "A."

10. That said Paragraph 14, providing for insurance coverage, impliedly provided that such insurance coverage would give the Plaintiff the usual and customary right to be defended, that the payment of any expenses or claims arising out of the type of action was covered by such insurance as is usually provided in such insurance policy; and Plaintiff called upon the Defendant pursuant to such implied undertaking to undertake the defense through its insurance carrier.

11. Notwithstanding such demand from the Plaintiff to the Defendant, the Defendant has failed and refused to undertake the said defense, and notwithstanding additional and repeated demands from the Plaintiff to the Defendant to undertake the defense of the said case from time to time during the suit, the Defendant failed and refused to undertake such defense, whereby the Plaintiff was caused to expend large sums of money for Court costs, investigation, pictures, depositions, travel expense, attorney's fees and all other usual and customary expenses connected with the defense of a law suit.

12. That the Plaintiff, through its attorney, vigorously defended the said suit and did everything necessary or required to be done to defend the same and the same was tried on October 19, 1956, before a jury, terminating in a verdict of Three Thousand ($3,000.00) Dollars for the minor, Donna Mower, and a verdict of Two Thousand ($2,000.00) Dollars for the parent, Clarence E. Mower, and that Judgment in said amounts was entered in said cause on the 4th day of January, 1957.

13. In addition thereto, Judgment for Costs in the sum of Three Hundred Sixty-four and 80/100 ($364.80) Dollars was entered against the Defendants therein, or the Plaintiff herein.

14. That upon the conclusion of the said trial, Defendant was again notified of the result and demand was made upon the Defendant to pay the Judgments and the Costs and expenses or to take an appeal, all of which the Defendant herein refused.

15. That the Plaintiff filed the necessary post trial motions and for a new trial which were denied and thereupon instituted an appeal, posting a Supersedeas Bond in the amount of Six Thousand ($6,000.00) Dollars and perfected and prosecuted the appeal vigorously to the Supreme Court of the State of Florida, which Court transferred the jurisdiction of the appeal to the District Court of Appeal, Third District of Florida, where the Plaintiff herein vigorously prosecuted the cause, terminating in an affirmance of the Judgment of the lower court.

16. That all of the foregoing was done at great expense in the preparation of records, transcripts of trial proceedings, attorney's fees, traveling expenses and all other necessary and usual costs and expenses attendant upon an appeal.

17. That the Plaintiff upon the refusal of the Defendant to pay the judgments, costs and expenses and interest upon Defendant's refusal to prosecute Writ of Certiorari to the Supreme Court, paid and satisfied the said Judgments and obtained and recorded a Satisfaction of Judgment dated the 11th day of February, 1958, and re-

corded on the 24th day of February, 1958, in Minute Book 360, at Page 167, in the Record Court Minute Books in and for Dade County, Florida.

18. The Plaintiff has incurred expense and has paid various large sums of money, an itemized statement of which is attached hereto and made a part hereof as Plaintiff's Exhibit "B," demand for which was made from the Defendant and which the Defendant has failed and refused to pay.

19. That the Defendant has breached and broken its agreement hereinabove set forth with reference to so much thereof as is contained in Paragraph 14 thereof, a copy of which is hereto attached and made a part hereof as Plaintiff's Exhibit "A," and has failed and refused to rectify the wrong done by failing and refusing to defend the law suit hereinabove described, to pay the costs and expenses thereof and to pay the Judgments entered therein. That as a proximate result of the Defendant's breach of its agreement, the Plaintiff has been compelled to employ the undersigned to prosecute this suit and has undertaken to pay him reasonable compensation therefor.

WHEREFORE, the Plaintiff alleges that it has been injured and damaged in an amount in excess of Five Thousand ($5,000.00) Dollars and claims damages from the Defendant in the amount of the total expenditures as set forth in Exhibit "B" attached hereto, together with in-

terest on each item at the rate of six (6%) percent from the date each item was paid.

ROLAND W. GRANAT,
Attorney for Plaintiff.
420 Lincoln Road,
Miami Beach 39, Florida.

By: _____

I HEREBY CERTIFY that a copy of the foregoing Amended Complaint was mailed to Williams and Salomon, Esqs., 1003 duPont Building, Miami 32, Florida, this _____ day of _____, 1958.

_____

## PLAINTIFF'S EXHIBIT "A."

14. DeSOTO HOTEL CORP. will be required to furnish, at its own expense, a public liability insurance policy insuring the parties of the first and second part, or so many of them as from time to time retain an interest in the property to which this license pertains, against liability for injury or damages sustained by any guest of DeSOTO HOTEL CORP. while on the premises covered by this license and said policy shall be in the amount of $100,000.00 for injury to one person and $200,000.00 for injury to more than one person and shall name those of the parties of the first and second part as are interested in said property from time to time as co-insureds with DeSOTO HOTEL CORP. thereunder.

## PLAINTIFF'S EXHIBIT "B."

### ITEMIZED STATEMENT OF DISBURSEMENTS AND CLAIMS RE: MOWER v. SURFCOMBER

| | | |
|---|---|---|
| 3/14/56 | Investigation expense | $ 176.13 |
| 6 12 56 | Deposition, Court Reporter | 48.25 |
| 6 11 56 | Travel expense for attorney to attend deposition in Canada | 419.85 |
| 6 12 56 | Deposition, Court Reporter | 48.25 |
| 6 15 56 | Deposition attendance of Reporter in Canada | 18.00 |
| 7 2 56 | Deposition cost (Canada) | 106.40 |
| 7 2 56 | Deposition | 25.00 |
| 10 16 56 | Miami Shores Medical Center, physician's examination | 65.00 |
| 10 25 56 | Court Reporter—attendance at trial | 80.00 |
| 11 6 56 | Dr. Neal—medical testimony at trial | 100.00 |
| 11 6 56 | Subpoena expense | 4.30 |
| | Premium Supersedeas Bond | 24.87 |
| | Mallicoat (transcript of trial proceedings) | 258.00 |
| 2/11/58 | Judgment | 5,000.00 |
| 2/11/58 | Interest on Judgment | 352.84 |
| 2/11/58 | Costs | 364.80 |
| | Attorney's fees and disbursements | 3,100.42 |
| | Total | $10,192.11 |

## ORDER OF DISMISSAL WITH PREJUDICE

January 8, 1959

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA AT LAW NO. 58L-2216

SURFCOMBER HOTEL CORP.,
a Florida corporation,

Plaintiff,

-vs-

DeSOTO HOTEL CORP.,
a Florida corporation,

Defendant.

THIS CAUSE coming on to be heard on the Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint, and the Court having heard argument of counsel for the Plaintiff and Defendant, and having examined the pleadings, and being well and sufficiently advised in the premises, it is thereupon

ORDERED AND ADJUDGED

That the Second Amended Complaint be and the same is hereby dismissed with prejudice.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, this 30th day of December, 1958.

/s/ ROBERT L. FLOYD
CIRCUIT JUDGE

**CASE NO. 59-122**

**IN THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT JULY TERM, A.D. 1959**

SURFCOMBER HOTEL CORP.,
a Florida corporation,

Appellant,

vs.

DESOTO HOTEL CORP.,
a Florida corporation,

Appellees.

Opinion filed August 24, 1959.

An Appeal from the Circuit Court for Dade County, Robert L. Floyd, Judge.

Roland W. Granat and Jules Israel, for appellant.

Williams & Salomon and Richard Kenney, for appellees.

PER CURIAM.
Affirmed.

HORTON, C. J., PEARSON and CARROLL, CHAS., JJ., concur.

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A. D. 1959
THURSDAY, DECEMBER 17, 1959

SURFCOMBER HOTEL CORP.,
a Florida corporation,

Petitioner,

vs.

DeSOTO HOTEL CORP.,
a Florida corporation,

Respondent.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari upon the transcript of record and briefs to review the order of the District Court of Appeal of Florida, Third District, in said cause bearing date August 24, 1959, and the record having been inspected, it is ordered that said Petition be and the same is hereby denied.

A True Copy

TEST:

Clerk Supreme Court.
(SEAL)